UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

ROAD SPRINLER FITTERS, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL 669

and Case 21-CE-374

COSCO FIRE PROTECTION, INC.

and

NATIONAL FIRE SPRINKLER ASSOCIATION, INC. Party in Interest

and

FIRETROL PROTECTION SYSTEMS, INC.
Party in Interest

Cecelia Valentine, Esq., for the General Counsel.

Alan R. Berkowitz, Esq., (Bingham McCutchen LLP) of San Francisco, California, for the Charging Party.

William W. Osborne, Esq. and Jason J. Valtos, Esq. (Osborne Law Offices) of Washington D.C for the Respondent.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on September 22, 2008.¹ The charge and first amended charge were filed by Cosco Fire Protection, Inc., ("Cosco") on July 10 and July 24, 2007 and the complaint was issued July 29.² The complaint as amended alleges that, on or about April 14, the Road Sprinkler Fitters, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 669 ("Union") and Cosco, through its membership in the National Fire Sprinkler Association ("NFSA") entered into a collective-bargaining agreement containing a clause prohibited by Section 8(e). The Union filed a timely

¹ That same day the Board issued an Order denying a motion for summary judgment that the Union had filed.

² All dates are in 2007 unless otherwise indicated.

answer that was modified at the hearing and admitted the allegations in the complaint concerning the filing and service of the charge, jurisdiction, and labor organization status.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Charging Party, I make the following.

Findings of Fact

10 I. Jurisdiction

Cosco, a corporation, with its principal place of business located in Orange, California, and operations in California, Washington, Oregon, and Alaska, has been engaged as a contractor in the construction industry performing the inspection, installation, and repair of fire suppression devices and alarms. During the calendar year ending December 31, 2006, a representative period, Cosco, in conducting these business operations, purchased and received at its Orange, California, facility goods valued in excess of \$50,000 directly from points located outside the State of California. The Union admits and I find that Cosco is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

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Cosco is owned by Consolidated Fire Protection, LLC ("Consolidated"). Consolidated also owns Firetrol Protection Systems, Inc. ("Firetrol"). Firetrol, like Cosco, is a contractor in the construction industry performing the inspection, installation, and repair of fire suppression devices and alarms. However, Firetrol is a Utah corporation with operations in Utah, Texas, Colorado, and Arizona.

NFSA is an organization of employers who are engaged in the installation, inspection, and repair of fire suppression devices and alarms throughout the United States. NFSA represents its employer-members in collective bargaining with the Union. Alexander Gettler is vice president of industrial relations and director of human resources for NFSA. Cosco is a member of NFSA, Firetrol is not. Through its membership in NFSA, Cosco is bound by a collective-bargaining agreement between the Union and NFSA as part of a multiemployer bargaining unit effective April 1, 2007 through March 31, 2010. Addendum C to that agreement, set forth below, contains the language at issue in this case. The first portion of that language is conceded by the General Counsel to be a lawful work preservation provision; it is the second portion of Addendum C that the General Counsel contends violated Section 8(e).

PRESERVATION OF BARGAINING UNIT WORK:

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In order to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid the protection or preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this Agreement as a single or joint Employer (which shall be interpreted pursuant to applicable NLRB and judicial principles) within the trade and territorial jurisdiction of Local 669, (under its own name or the name of another, as a corporation, sole proprietorship, partnership, or any other business entity including a joint venture, where

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the Employer (including its officers, directors, owners, partners or stockholders) exercise either directly or indirectly (such as through family members) controlling or majority ownership, management or control over such entity, the wage and fringe benefit terms and conditions of this Agreement shall be applicable to all such work performed on or after the effective date of this Agreement. The question of single Employer status shall be determined under applicable NLRB and judicial principles, i.e., whether there exists between the two companies an arm's length relationship as found among unintegrated companies and/or whether overall control over critical matters exists at the policy level. The parties hereby incorporate the standard adopted by the Court in Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975) and affirmed by the Supreme Court, 425 U.S. 800 (1976), as controlling. A joint employer, under NLRB and judicial principles, is two independent legal entities that share, codetermine, or meaningfully affect labor relations matters.

Should the Employer establish or maintain such other entity within the meaning of the preceding paragraph, the Employer is under an affirmative obligation to notify the Union of the existence and nature of and work performed by such entity and the nature and extent of its relationship to the signatory Employer. The supplying of false, misleading, or incomplete information (in response to a request by the Union) shall not constitute compliance with this section The Union shall not unreasonable delay the filing of a grievance under this Article.

The foregoing portion is admittedly lawful. This language, or substantially identical language, has existed in prior collective bargaining agreements between the Union and NFSA. On about September 9, 2004, the Union filed a grievance against Cosco. Among other things, the grievance asserted that the terms of the agreement should be applied to Firetrol because it and Cosco were a single employer or joint employer. Arbitrator Ira Jaffe heard the grievance in June 2005, and on April 26, 2006, he issued an Arbitration Award denying the grievance in pertinent part and concluding that Cosco and Firetrol were separate employers commonly owned by Consolidated. Continuing with the langiage of Addendum C:

In the event that the Union files, or in the past has filed, a grievance under Article 3 of this or any prior national agreement, and the grievance was not sustained, the Union may proceed under the following procedures with respect to the contractor(s) involved in the grievance:

Should the Employer establish or maintain operations that are not signatory to this Agreement, under its own name or another or through another related business entity to perform work of the type covered by this agreement within the Union's territorial jurisdiction, the terms and conditions of this agreement shall become applicable to and binding upon such operations at such time as a majority of the employees of the entity (as determined on a state-by-state, regional, or facility-by-facility basis consistent with NLRB unit determination standards) designates the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards, pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of the ratification of this Agreement. The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election. . . .

Because the practice of double-breasting is a source of strife in the sprinkler industry that endangers mutual efforts to expand market share for union members and union

employers, it is the intention of the parties hereto that this clause be enforced to the fullest extent permitted by law. . . .

The forgoing language was added to the most recent collective-bargaining agreement and is at issue in this case.

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B. Analysis

Section 8(e) generally prohibits agreements between employers and unions that require the employer to cease doing business with any other person. But Supreme Court decisions instruct that this language is not to be taken literally but instead must be applied to only to those agreements that have secondary, and not primary, objectives. *NLRB v. Longshoremen ILA*, 477 U.S. 490 (1980); *NLRB v. Pipefitters*, 429 U.S. 507 (1977); *National Woodwork Mfrs. Assn.*, 386 U.S. 612 (1967). In general, a primary objective is one that seeks to preserve unit work while a secondary objective is one that seeks to expand union goals into nonunit work. Even if the agreement has a work preservation objective, the employer subject to the agreement must have the right to control the flow of unit work; if the employer lacks such control then the objective is deemed secondary. *NLRB v. Longshoremen ILA*, supra.

In Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023 (1993), the Board addressed the issue of whether a union violated Section 8(b)(3) by insisting to impasse on the inclusion of the following language in a collective-bargaining agreement that would violate Section 8(e):

In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of in the jurisdiction of this Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract.

The union in that case argued that the clause fell within the construction industry proviso to Section 8(e). The Board concluded that the provision fell within the literal meaning of Section 8(e) because it was calculated to cause Alessio to sever its ownership relationship with affiliates that sought to remain nonunion. Next the Board concluded that the provision did not seek to preserve unit work for the union but rather sought to acquire work the union had not traditionally performed. In this regard the Board pointed to the absence of any language in the provision regarding unit work. The Board also concluded that the provision would apply even in situations where an employer did not have the right to control the flow of unit work. The Board then addressed whether the provision fell within the construction industry proviso to Section 8(e). The Board strictly construed the scope of the proviso and concluded that the provision was not of a type that Congress intended to be covered by the proviso.

In *Alessio* is *Painters District Council 51 (Manganaro Corp.)*, 321 NLRB 158 (1996) the disputed provision read:

Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs onsite construction work of the type covered by this Agreement, under its own

name or the of another, is a corporation, company, partnership,, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners, or stockholders exercises directly or indirectly (including but not limited to management, control or majority ownership through family membership) management, control, or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

The Board concluded that the provision was facially lawful in that it covered unit work in circumstances where the employer controlled that work.³

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Applying these cases to the agreement at issue here, I first conclude that the language is designed apply to business entities that perform unit work. The language "to perform work of the type covered by this agreement within the Union's territorial jurisdiction" is almost identical to the language in *Manganaro* that the Board found was directed at unit work. It follows that the agreement has a work preservation objective. Next, the agreement on its face applies only when a signatory employer establishes or maintains operations that perform unit work. On its face this language clearly can be read to satisfy the "right to control" test. The General Counsel argues that the "establish or maintain" language cannot be read to require control, but he cites no case on point. The Charging Party argues that the agreement lacks the requisite element of control because it could apply to situations where a signatory employer establishes another employer but thereafter relinquishes the ability to control the flow of unit work of the newly established employer. But in assessing the facial validity of a clause:

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Settled Board law requires us to construe a challenged clause "to require no more than what is allowed by law" when it is not "*clearly* unlawful on its face." *General Teamsters, Local 982 (J. K. Barker Trucking Co.*), 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971). (Emphasis added.)

Heartland Industrial Partners, 348 NLRB 1081, 1084 (2006).

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The Charging Party also contends that:

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[H]ad the Union continued its efforts to impose Cosco's Contract on Firetrol in view of this finding of separateness by the arbitrator, such conduct would violate Section 8(b)(4) of the Act.

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The General Counsel makes a similar argument. However, there is no such allegation in the complaint nor is there any evidence in the record that the Union has sought to apply the agreement against Firetrol. I therefore cannot resolve that issue. *Central Pennsylvania Regional Council of Carpenters (Novinger's, Inc.)* 337 NLRB 1030 (2002).

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The General Counsel points to the fact that the Union can use the disputed agreement only after it has filed and lost a grievance under the other section of the collective-bargaining agreement I have described above. From this the General Counsel argues that the agreement must therefore violate Section 8(e). I disagree; the language simply reflects an ordering of the grievances to be filed. I conclude that on its face the agreement is a lawful work preservation agreement.

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³ Because this case, like *Manganaro*, involves only a challenge to the facial legality of the agreement, I ruled that I would not allow litigation of the issue of whether Cosco and Firetrol was a single employer, as originally plead in the complaint. *Manganaro*, id. at 167, fn. 33.

Alessio is readily distinguishable from this case. The contested provision here applies only to entities that "perform work of the type covered by this agreement." Again, this means it applies only to unit work. The aim of the clause is primary in purpose; it does not seek to acquire work of a type not covered by the contract. In addition, the contested provision applies only to entities that are established or maintained by a signatory employer. Again, this language clearly may be read to require the employer to have the right to control the flow of unit work.

The fact that the application of the agreement is limited to circumstances where the Union establishes its majority status does not alter this result; instead, it assures the development of a Section 9(a) relationship. In reaching this result I also consider Heartland Industrial Partners, 348 NLRB 1081 (2006). In that case the challenged agreement applied to business entities controlled by the employer, as specifically defined in the agreement. In general, the agreement allowed the union to organize the controlled business entities while the business entities took a position of neutrality regarding the organization effort. If and when the union gained majority support among the employees then the agreement required the business entity to recognize and bargain with the union. The Board found that the challenged agreement did not require any cessation of business between the employer and the business entities and thereby did not violate Section 8(e). In the process the Board rejected the notion that the recognition requirement of the agreement was tantamount to a cease doing business objective. The Charging Party would distinguish *Heartland* on the basis that it involved a *parent* company and the General Counsel makes a similar argument, but there is no indication that the Board intended so limited a holding, at least in this case where the agreement applies only to employers established or maintained by the signatory employer.

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In light of my decision that the agreement has a lawful work preservation objective, I find it unnecessary to decide whether the agreement would nonetheless be lawful under the construction industry proviso to Section 8(e) even if it had unlawful objective.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁴

ORDER

The complaint is dismissed.

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Dated, Washington, D.C. November 3, 2008

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William G. Kocol Administrative Law Judge

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⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.